SUPPLEMENTAL APPENDIX

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RE: AAA Case No. 14 621 0004 89 Q
Flying Tiger Lines, Inc., et al. and
Teamsters Pension Trust Fund
of Philadelphia & Vicinity

Gentlemen:

There follows a list of some of my tentative reactions and comments regarding the evidence and arguments in the above case, based upon my review of the briefs and record to date, as well as some specific questions. I thought these might be helpful for purposes of focusing the discussion during the oral argument that has been scheduled for Thursday, July 22. By providing these comments and questions I do not intend to foreclose

either party from covering other matters that it might wish to address.

1. Tiger's evidence supporting the proposition that sale of Hall's was necessary in order to achieve an ESOP or obtain additional lender support seems rather thin. Moreover, under all the circumstances it seems somewhat implausible that Cronin and Tiger management would not have had greater awareness than has been represented regarding the full significance of Hall's potential MPPAA liability.

2. The significance attributed by the Fund to its "smoking guns" appears greatly overstated. For example, I see no significance to Whit Lee's statement, as reported in the Goffman memorandum, that upon his purchase of Hall's he would be assuming its $38 million pension liability. The Lafferty memorandum suggests that Cronin had greater concern regarding Hall's MPPAA liability than Cronin has acknowledged, but certainly does not constitute a "direct admission of Tiger's evasive purpose" as the Fund has claimed for all of the "smoking guns."

3. The Imm memorandum, insofar as it may be assumed to reflect what he was told by Tiger representatives, does indicate that a purpose of the sale, or at least its timing, was to avoid having to disclose Tiger's potential MPPAA liability. With regard to that point, the Fund repeatedly equates Tiger's possible desire to avoid having to disclose a potential withdrawal liability with a violation of Section 4212(c). I'm not at all sure the two are the same.

4. In connection with the last item, just what disclosure did Tiger avoid making in its February 1985 registration statement that it would have had to make absent the sale?

5. Arguably the case can be made that absent MPPAA, Tiger could have done better by liquidating Hall's rather than selling it as a going concern, at least

under the terms that it did. Once withdrawal liability is taken into account, however, liquidation would seemingly have been foolhardy. Under such circumstances, is it the Funds' position that if Tiger wished to dispose of Hall's it could avoid running afoul of Section 4212(c) only by liquidating? Does the answer to that depend on what Hall's prospects for survival were at the time of the sale? If so, how impaired must Hall's prospects for survival have seemed at the time of the sale in order for Section 4212(c) to be implicated?

6. What does the evidence concerning Hall's eventual failure and the reasons for it tell us about how its chances for survival after the sale should have been evaluated in December 1984?

7. In *Dorn's Transportation Co.* the Third Circuit held that "when the seller enters a transaction to escape liability, but the buyer has no intention of taking subsequent action that will reduce the payments owing to the Plan, it does not appear that a 'principal purpose of the transaction' as a whole is to escape liability." In that case the buyer's lack of awareness of the seller's potential liability established that it did not enter the transaction for such purpose. In the present case Bodford was aware of the potential liability, but since the evidence indicates to me that his intent was to make a success of Hall's as a continuing contributor, the principle of the *Dorn*'s decision would seem to apply. While the Third Circuit, in *Flying Tiger* and *Colteryahn Dairies*, has since referred to the "unusual circumstances" of *Dorn's* and the narrowness of its holding, I read those references as applying to its holding allowing arbitration to be bypassed, not to its ruling as to the meaning of Section 4212(c). Since I believe I am governed by *Dorn's*, I invite further comment and argument concerning its application here.

8. In *Concrete Pipe & Products v. Construction Laborers Pension Trust*, the Supreme Court concluded that under Section 4221(a)(3)(A) the burden is on the

employer in a MPPAA arbitration proceeding to disprove by a preponderance of the evidence that a principal purpose of the sale of Hall's was not to evade or avoid withdrawal liability. Does either party have any comments on the application of the Supreme Court's decision?

9. In connection with the accrual theory of liability is it the Fund's position that Hall's itself had no withdrawal liability?

10. With respect to the Fund's invoking of § 405 of MPPAA in connection with its accrual theory argument, what is the relevant provision of MPPAA whose application "to a particular circumstance is to be set forth in regulations"?

Very truly yours,

/s/ Robert E. Nagle
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Arbitrator